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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 552

R. A. HABERMAN, JR., Independent Executor of the Estate of Elizabeth H. Gravis, Deceased,
Petitioner,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Argument

Petitioner's application for certiorari is based upon the contention that the decision of the Court of Appeals (which is reproduced in Appendix A of the Petition, pp. 18-38) is in conflict with the applicable law of the State of Texas on two questions, namely:

1. Is the Refund Annuity sold by respondent to Mrs. Gravis a "security" within the meaning of that term as used in the Texas Securities Act, Art. 600a, Revised Civil Statutes of Texas; and
2. Is such annuity "void", and therefore subject to rescission by petitioner, because respondent did not

comply with Art. 2031a, Revised Civil Statutes of Texas?

It is respondent's position that no such conflict exists, that the Court of Appeals decided the case correctly, and, therefore, that the petition is without merit and should be denied.

Petitioner himself admits, at page 4 of his brief, that:

> "There are no decisions of the Texas courts construing the two statutes on the precise questions involved here."

If such be the case, and respondent agrees that it is, it is difficult to see how the decision of the Court of Appeals could be in conflict with applicable state law.

As a matter of fact, there simply is no applicable state law on the "security" question. So far as the law of Texas is concerned, the question is definitely one of first impression, although it has been decided (contrary to petitioner's contention) in three other jurisdictions, as noted below.

With respect to the second question (i.e., the effect of respondent's non-compliance with Art. 2031a), while here, too, there are no Texas decisions directly in point, there are several Texas cases, to say nothing of numerous cases from other jurisdictions, which indicate rather clearly that the Texas courts would undoubtedly reach the identical result as that reached by the Court of Appeals.

Accordingly, there certainly is no conflict between the decision below and applicable state law. It is apparent, therefore, that petitioner is asking this Court to grant certiorari simply for the purpose of substituting its own view for that of the Court of Appeals as to how the courts of Texas would decide the two questions mentioned above. This is not only contrary to the long standing policy of

this Court, *Stern & Gressman, Supreme Court Practice,* 119-120 (2d ed., 1954), but is also directly opposed to the frequently expressed opinion of this Court that the Courts of Appeals are particularly qualified to determine and apply the laws of the several states within their respective circuits and that, accordingly, their decisions regarding state law will not be reviewed by this Court unless they are arbitrary or unreasonable. For example, in *Propper* v. *Clark,* 337 U. S. 472, 486-487 (1948), this Court said:

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable. . . .
>
> "Since the determination of the state law issue . . . by the courts below is not unreasonable, we accept it as correct for the purposes of this case."

And in *Spiegel* v. *Commissioner,* 335 U.S. 701 (1949), this Court said, at pages 707-708:

> "The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions . . . It is sufficient for us to say that we think reasonable arguments can be based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances, we will follow our general policy and leave undisturbed this Court of Appeals' holding on the question of state law."

See also, *Gardner* v. *New Jersey,* 329 U.S. 565, 582-583 (1947); *Hillsborough* v. *Cromwell,* 326 U.S. 620, 629-630 (1946); *Helvering* v. *Stuart,* 317 U.S. 154, 162-165 (1942); *MacGregor* v. *State Mutual Assurance Co.,* 315 U.S. 280

(1942). These, and many other, decisions of this Court make it clear that where there is no conflict between the Court of Appeals' decision and applicable state law, a petition for certiorari will be denied unless the petitioner can show that the decision below was unreasonable or arbitrary.

An Annuity Is Not A "Security"

Obviously, there is nothing unreasonable or arbitrary about the Court of Appeals' holding on the "security" question. On the contrary, the Court of Appeals was entirely correct, as a matter of law, in holding that respondent's Refund Annuity contract is *not* a "security" within the meaning of that term as used in the Texas Securities Act. The Court of Appeals' opinion on this point (Appendix A of the Petition, pp. 24-27) speaks eloquently in its own behalf and requires no additional support from us except, perhaps, to emphasize that petitioner's only authority for his argument that an annuity is a "security" is a line of cases, represented in Texas by *Daniel* v. *Life Insurance Co. of Virginia*, 102 S.W. 2d 256 (Tex. Civ. App. 1937), holding that an annuity contract *differs from* a policy of insurance. Specifically, *Daniel* held that a gross receipts tax on foreign life insurance companies measured by "premiums . . . collected *upon policies of insurance*" did not apply to the considerations paid to the insurance company for annuities sold by it. In so holding, the court reasoned that "in general parlance insurance does not include contracts of annuity" and "absent something in the context or other portions of the statutes showing a different legislative intent . . . the words 'premiums on insurance' must be given their generally accepted meaning." The case had *absolutely nothing* whatever to do with the Texas Securities Act, nor with the question whether an annuity is a "security" under that Act or other-

wise. Moreover, the Court's characterization of an annuity as an "investment" was dicta, pure and simple.

Petitioner has seized upon this dicta in the *Daniel* case, together with the phrase "investment contract" which appears in the statutory definition of the word "security" in the Texas Securities Act, and has parlayed these two isolated, unconnected and not particularly apt expressions into a flimsy argument that an annuity is a "security" within the statutory definition of that term. That is literally all there is to petitioner's argument.

As the Court of Appeals pointed out, petitioner's argument is completely contrary to the ordinarily accepted meaning of the terms "annuity" and "security". Moreover, the three cases in point from other jurisdictions, to-wit: *Hamilton* v. *Penn. Mutual Life Insurance Co.*, 196 Miss. 345, 17 So. 2d 278 (1944); *Bates* v. *Equitable Life Assurance Society of the U. S.*, 206 Minn. 482, 288 N.W. 834 (1939); and *Rinn* v. *New York Life Insurance Co.*, 89 F. 2d 924 (C.A. 7 1937), *all* support respondent's contention that an annuity is *not* a "security" as that term is used in "Blue-sky" and "Securities" legislation. While *Bates* and *Rinn* involved statutory language somewhat different from that contained in the Texas Securities Act, *Hamilton* is on all fours with the instant case since the definition of the term "security" in the Mississippi statute was almost identical with that in the Texas Securities Act. The Mississippi statute provided that:

> "The term 'securities' as used in this Act, shall mean and include any stocks, treasury stock, bond, debenture, transferable certificate of interest or participation, certificate of interest in an oil, gas or mining title or lease, collateral, trust certificate, monthly installment savings bond or certificate, diversified trustee shares, or transferable share, *investment contract* or beneficial interest, whatsoever in, or title to, property or profits, or any

instrument commonly known as a security" (4 Miss. Code, 1952, Sec. 5361).*

The defendant admitted that the annuities had not been registered and sold in compliance with the Mississippi Blue Sky law, but contended that they were not subject thereto, just as respondent contends in this case with respect to the Texas Securities Act. In upholding this contention, the Mississippi Supreme Court reasoned as follows (p. 280):

> "These annuity policies, though not life insurance policies, are such as a life insurance company is authorized to issue and therefore are subject to the provisions of our statute regulating the business of life insurance companies, 4 Miss. Code, 1942, Sec. 5630, *and not to the requirements, in this connection, of the Blue Sky Law.*"

Precisely the same reasoning was applied by the Court of Appeals in rejecting petitioner's argument that respondent's annuity came within the definition of "security" in the Texas Securities Act. In this connection, Judge Tuttle said (App. A of Petition, p. 26):

> ". . . we perceive a striking difference between the instruments specifically included in the definition, on the one hand, and insurance and annuity policies of regulated companies, on the other; *the latter are governed by a special statutory scheme,* and reserves are required by law to be maintained for them. Thus we think the general words "investment contract" cannot be reasonably interpreted as including something so dissimilar to the specifically named instruments, as the annuity in this case."

Certainly it is reasonable to assume that if the case at bar had been litigated in the Texas courts they would have applied the same reasoning and would have reached the same

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* Emphasis supplied throughout this brief.

result as did the Court of Appeals and courts in the three jurisdictions cited above, namely, that an annuity issued by a regulated life insurance company is *not* a "security". On the other hand, it is entirely unreasonable to take the position, as does petitioner, that the Texas courts would reject the only authorities in point to reach a decision, purely on the basis of semantics and violative of the commonly accepted significance of the words involved which would subject the issuing company to regulation under *both* the Insurance Code *and* the Blue Sky Law.

Accordingly, we submit that the Court of Appeals not only decided the "security" question correctly, but also decided it exactly the same way the Texas courts would have decided it. It follows, therefore, that there is no merit whatsoever in petitioner's claim of conflict on this point.

Petitioner Has No Right Of Rescission Under Art. 2031a

Art. 2031a, R.C.S. Tex. 1925, prohibits a "foreign corporation" from transacting business in Texas until it has filed in the office of the Secretary of State a power of attorney designating a resident of Texas as its agent upon whom process may be served. The statute renders "void" any act in Texas of a foreign corporation "which is required by the terms of this Act to file the power of attorney", but which has failed to do so.

Petitioner contends that Art. 2031a applies to respondent and that, because of respondent's noncompliance with the statute, the annuity sold by respondent to Mrs. Gravis, is "void" and, although fully executed by respondent, can, nevertheless, be rescinded by petitioner.

Respondent contends, on the other hand, that since it is engaged in Texas in the *life insurance* business, it is subject to the provisions of the Texas Insurance Code, and not to the laws relating generally to "foreign corporations". Specifically, respondent contends that, having designated

the Chairman of the Board of Insurance Commissioners as its resident agent for service of process in Texas pursuant to Art. 4763 (now Art. 3.65 of the Texas Insurance Code), respondent is not and never has been obligated to file *another* designation in the office of the Secretary of State pursuant to Art. 2031a.

The Court of Appeals felt that it was unnecessary to decide whether Art. 2031a applies to foreign life insurance companies, because, the contract having been fully performed. petitioner was not entitled to rescission in any event.

The rule that a fully executed contract is not subject to rescission on the ground of alleged illegality is not only a rule of general application, as stated by the Court of Appeals, but is unquestionably the law of Texas as well. In *Woolsey* v. *Panhandle Refining Co.*, 131 Tex. 449, 116 S.W. 2d 675, 678 (1938), the Supreme Court of Texas reaffirmed the rule which had been established in Texas as early as 1886, saying:

> "Associate Justice Stayton in Davis v. Sittig, supra (65 Tex. 497), after discussing the rule controlling the construction of illegal contracts, quoted as follows from Pomeroy on Equity, p. 940: 'If the contract has been voluntarily *executed and performed*, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or the property delivered, or a cancellation of the conveyance of transfer'."

This reluctance by the courts to rescind a fully executed contract on the grounds of illegality has found particular expression, as indicated by the numerous authorities cited by the Court of Appeals in its opinion, in the almost universally accepted rule that noncompliance with regulatory statutes by foreign corporations will not justify rescission of a fully executed contract. This regard for the integrity

of fully executed contracts has been read into statutes which condemn, in the most unreserved terms, contracts made by a noncomplying foreign corporation.

For example, in *Gill* v. *S.H.B. Corp.*, 322 Mich. 700, 34 N.W. 2d 526 (1948), 7 A.L.R. 2d 256, the plaintiff sought to rescind an amendment to a contract, such amendment having been made *after* the foreign corporation's certificate had been revoked because of failure to pay taxes. The Michigan statute provided that an unrevoked certificate was a prerequisite to "making a valid contract in this state". The court held that the statute could not be employed as a means of rescinding a fully executed contract.

To the same effect is *Carolin Mfg. Corp.* v. *George S. May*, 312 Mich. 487, 20 N.W. 2d 283 (1945), which involved an action to recover money paid under a personal service contract on the ground that the contract was illegal because defendant was an unlicensed foreign corporation. The holding here was an alternative holding, but the case is particularly interesting because of its bearing on the Court of Appeals' statement that the rule protecting executed contracts against rescission is especially appropriate to the type of contract involved in this case. The court in the *Carolin* case, *supra*, said at p. 289:

> "Plaintiff's claim, in the final analysis, is somewhat analogous to a rescission of a contract because it was illegal not in the sense of malum in se but malum prohibitum. Had this been an executory contract, there would be merit in plaintiff's contention, but here we have an executed contract where plaintiff cannot return consideration consisting entirely of personal services. We do not believe that plaintiff can keep all the benefits of a contract and at the same time recover what it had paid for them."

Similarly, in the instant case, Mrs. Gravis (the annuitant) received all the benefits of the annuity during her lifetime,

consisting not only of regular monthly payments but also the peace of mind that goes with the certainty that one will have financial security for the rest of one's life. That security, which the annuity gave Mrs. Gravis prior to her death, cannot be returned by petitioner, and it would be manifestly unjust to permit petitioner to rescind the contract at this time.

See, also, *McMillan* v. *Pawnee Petroleum Co.*, 151 Okla. 4, 1 P. 2d 755 (1931), where plaintiff sought the cancellation of a deed on the ground of noncompliance by the defendant with an Oklahoma statute providing that:

> "If any such foreign corporation shall fail to comply with the foregoing provisions of this article, *all of its contracts* with citizens of this State . . . *shall be void* as to the corporation, and no court of this State shall enforce the same in favor of the corporation."

The language of this statute, particularly the use of the word "void", is quite similar to that of Art. 2031a, and yet the Oklahoma court had no difficulty in concluding that this drastic statute did not enable a party to rescind a fully executed contract.

For a more extensive collection of authorities see Annotation, 7 A.L.R. 2d 256 (1949).

Petitioner's argument against the decision of the Court of Appeals turns on the doubtful proposition that the Texas courts have never specifically held that a fully executed contract could not be rescinded even though pronounced "void" under Art. 2031a, and that the language of the statute precludes an interpretation disallowing such rescission. In other words, petitioner argues that the Texas courts would, for some unexplained reason, reject the rule which our Supreme Court reaffirmed in *Woolsey* v. *Panhandle Refining Co., supra,* as having been the law of Texas since 1886, and would also reject the almost unanimous authorities from

other jurisdictions that even though a contract be declared "void" or "voidable" for noncompliance with some statutory regulation, it can not be rescinded after it has been fully executed. Petitioner has made no showing whatsoever, either in reason or authority, as to why the Texas courts would depart from this well-established rule. In this connection, it is obvious that statements from Texas' decisions that the legislature has the power to make contracts "void", or that a contract prohibited by statute is "void", shed no light on the question at all. Accordingly, petitioner again has not only failed to show any conflict between the decision below and applicable State law, but has also failed to show that the decision below is in any way unreasonable or arbitrary. Therefore, petitioner has not made out a case for the granting of certiorari and the petition should be denied.

However, we wish to make it clear that respondent does not rely solely or even primarily upon the rule that fully executed contracts made by a corporation in violation of a regulatory statute will not be rescinded. In fact, that rule was applied by the Court of Appeals on its own motion, and not at the suggestion or request of respondent. Respondent's contention before both of the lower courts was that Art. 2031a is inapplicable to foreign *insurance* companies, and it was so held by the District Court. Since the Court of Appeals found is unnecessary to decide that point, respondent's principal contention regarding Art. 2031a is not really set out in the Record before this Court.

Admittedly, respondent has never complied or attempted to comply with Art. 2031a. However, respondent has at all material times complied with the *parallel* provision of the Texas Insurance Code (formerly Art. 4763, now Art. 3.65) requiring a foreign life insurance company during business in Texas to appoint the Chairman of the Board of Insurance Commissioners as its resident agent for service of process.

We wish to emphasize this point, so that the Court will not be under the impression that respondent had no resident agent for service in Texas.

What petitioner's argument, therefore, really boils down to is that respondent should have filed a designation of a resident agent for service of process, *not only with the Board of Insurance Commissioners, as it admittedly did* under Art. 4763, but *also* in the office of *the Secretary of State* under Art. 2031a, and that, since respondent did not file such additional designation in the office of the Secretary of State, all of respondent's acts performed in this State (presumably dating back to the time of respondent's original admission to Texas) are "void".

We submit that the laws of Texas are not so absurd as petitioner has tried to make them appear. Despite the unqualified reference in Art. 2031a to "foreign corporations", we think it is clear that this general statute has no application to foreign *life insurance companies* doing business in Texas *pursuant to the laws of Texas specifically governing such matters.* The following provisions of the Texas Insurance Code, which were taken substantially unchanged from corresponding statutes originally enacted by the Texas Legislature in 1903, show clearly and conclusively that the activities of foreign insurance companies in Texas are to be *governed by the laws of Texas relating specifically to insurance and insurance companies*, and not by our *general* corporation laws:

> "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby . . ." (Art. 21.42).
>
> * * *

> "The provisions of this code are conditions upon which foreign insurance corporations shall be permitted to do business within this State, and any such foreign corporation engaged in issuing contracts or policies within this State shall be held to have assented thereto as a condition precedent to its right to engage in such business within this State." (Art. 21.43).

Moreover, Art. 1538, R.C.S. Tex. 1925, which is a part of Chapter 19, entitled "Foreign Corporations", provides that:

> "The provisions of this chapter shall not apply to ... such corporations as are required by law to procure certificates of authority to do business from the *Commissioner of Insurance* ..."

This statute has been held to exempt foreign *insurance* companies from the requirement applicable to foreign corporations generally that they qualify under our "foreign corporation" laws before doing business in Texas. *Hartford Fire Insurance Co.* v. *Galveston H. & S.A. Railway Co.*, 239 S.W. 919 (Tex. Comm. App. 1922); *American National Insurance Co.* v. *U.S.F. & G. Co.*, 24 S.W 2d 474 (Tex. Civ. App. 1929); *Price* v. *American Surety Co.*, 59 S.W. 2d 426 (Tex. Civ. App. 1933). True, Art. 1538 refers specifically to "the provisions of *this chapter*", i.e., Chapter 19, and, technically speaking, Art. 2031a is not included in Chapter 19 in the codification of the Texas statutes. However, Art. 1538 was adopted in 1903, *long before* the Legislature enacted Art. 2031a in 1933. It seems reasonable to believe that the Legislature was referring to the *same* corporations when it used the words "foreign corporation" in Art. 2031a as were included within those same words when used in the other "foreign corporation" statutes which are contained

in Chapter 19. Therefore, respondent contends that the specific exemption provided by Art. 1538 is applicable, by construction, not only to the articles which the codifier grouped together in Chapter 19, but to other, and particularly to *subsequent*, legislation dealing generally with "foreign corporations", including Art. 2031a, under the well-settled rule that statutes "in pari materia", i.e., dealing with the *same subject matter*, will be construed together and reconciled wherever possible. As stated in 82 CORPUS JURIS SECUNDUM 803 (Statutes, § 366):

> "Under the so-called 'pari materia' rule of construction, it is well established that in the construction of a particular statute, or in the interpretation of its provisions, *all statutes relating to the same subject . . . should be read in connection with it;* and such related statutes may or should be construed together as though they constituted one law . . . and the legislative intention must be ascertained, not alone from the literal meaning of the words of a statute, *but from a view of the whole system of which it is a part.* This rule of construction applies although the statutes to be contrued together were enacted at different times, and contain no reference to one another; *and it is immaterial that the statutes are found in different chapters of the revised statutes and under different headings.*"

We urge that, under any reasonable interpretation of the Texas statutes, respondent, having complied with Art. 3.63 of the Insurance Code, was *not* required to file an *additional* designation with the Secretary of State. Admittedly, there is no Texas decision so holding. Therefore, while the question is one involving Texas law, it is entirely proper, indeed necessary, to look for guidance to the authorities from other jurisdictions. Petitioner cannot point to a single case from any jurisdiction in which it was held that an insurance

company had to file duplicating or overlapping designations of an agent for service of process. On the contrary, the authorities hold otherwise. The leading case of *St. Louis, etc. Ry. Co.* v. *Commercial Union Insurance Co.*, 139 U.S. 223 (1891), is directly in point. This case involved the precise question raised by petitioner, that is, whether a foreign insurance company which had designated an agent for service of process in compliance with a specific requirement of the *insurance* laws of the state (Arkansas), was *also* required to file an *additional* designation with the Secretary of State pursuant to a statute applicable by its express language to "*any* foreign corporation", and to which there was no stated exception whatsoever.

Pointing out that the Arkansas statutes regulating foreign insurance companies long antedated the general foreign corporation laws of that state (as is also true in the case of Texas), this Court held squarely that, since the insurance company had filed the designation required by the *insurance* laws of Arkansas, it was *not obligated* to file an *additional* designation under the foreign corporation laws. It is especially significant, we think, that this decision was reached not on the basis of any *express* exemption or exclusion of insurance companies from the broad comprehensive language used in the Arkansas statute applicable to foreign corporations(this statute by its terms was applicable to "*any* foreign corporation") but on the basis of the following reasoning which, we submit, is precisely applicable, to the case at bar:

> "It thus appears that the State of Arkansas had established and maintained a distinct system with regard to foreign insurance companies, under the superintendence of the state auditor, by which every such company was required to file with the auditor a stipula-

tion for the service of process upon it, as well as to make full returns of its condition and business to that officer, to report to him the names of all its agents within the state, and to receive from him certificates of authority for itself and for each of its agents.

"Such being the settled policy of the State with regard to foreign insurance companies, *they cannot reasonably be held to be governed by the acts concerning foreign corporations generally,* which required a certificate to be filed with the Secretary of State, designating an agent upon whom service might be made, and stating the principal place of business of the corporation within the State. To construe that act as including foreign insurance companies would require the drawing of one of two equally improbable inferences; either that the only stipulation of such companies for service of process upon them should be filed in a different public office from that in which all other returns and documents relating to such corporations are preserved; or else that their stipulations for such service must be filed both with the auditor and with the Secretary of State.

"For these reasons, we are satisfied that the omission of the plaintiffs to file in the office of the Secretary of State the certificates required by the statutes of Arkansas of April 4, 1887, c. 135, was no bar to this action; . . ." (139 U.S. 223, 234).

See, also, *John Hancock Mutual Life Insurance Co.* v. *Lookingbill,* 218 Ia. 373, 253 N.W. 604 (1934), where the court flatly rejected the contention that an insurance company must secure a permit to do business from *both* the Insurance Commissioner *and* the Secretary of State, this contention being based on the Ohio general corporation law which required a permit from the Secretary of State for *all* foreign corporations, without any express exemption of insurance companies.

Conclusion

It is apparent from the foregoing that the decision of the Court of Appeals is not in conflict with applicable Texas law in any respect. It is likewise apparent that the Court of Appeals decided the case correctly and as it would have been decided by the Texas courts.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari is without merit and should be denied.

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Certificate of Service

I hereby certify that I have delivered a copy of the above Brief in Opposition to counsel of record for the petitioner by depositing the same in the United States mail, with first class postage prepaid, addressed to counsel of record at his post office address.

F. G. Coates

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